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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 624

MACK BARNES,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Criminal Appeals of Texas and the opinion on Motion for Rehearing are not yet printed. They appear, however, in Petitioner's brief in the Appendix thereto, pp. 20-24.

Jurisdiction

Petitioner has not invoked the jurisdiction of this Court under 28 U.S.C. 1257(3) for the following reasons:

1. Nowhere in the record, and particularly in Petitioner's Bill of Exception and Motion for New

Trial, did Petitioner specially set up or claim any title, right, privilege or immunity under the Constitution of the United States.

3. The grounds of error here presented were never urged in any definite manner before the trial court and under the rules of practice in the Court of Criminal Appeals in Texas, the latter Court could not consider such alleged errors, and this Court is without power to consider Federal questions not raised in accordance with the requirements of State laws.

3. The decision of the Texas Court of Criminal Appeals rests upon adequate non-federal grounds.

4. The Fourth Amendment to the United States Constitution applies only to the Federal government and not to State officers.

Argument and Authorities on Jurisdiction of the Supreme Court

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. 1257(3) without complying with the requirement of such statutes in that, contra to his assertion, Petitioner did not specifically set up or claim any right, title, privilege or immunity under the Constitution of the United States. A review of Petitioner's Bills of Exceptions Nos. 4, 5 and 8 and his amended motion for a new trial shows this to be true, for his objections and exceptions there made were wholly insufficient to notify the trial court of any Federal question now being urged, and not hav-

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ing been thus set up or claimed in that Court, the Petitioner has failed to invoke the jurisdiction of this Court.

The scope of review of the Court of Criminal Appeals of Texas is limited to the grounds or assignments of error which a defendant has preserved by an adequate Bill of Exception and motion for new trial in the trial court. The Texas Court has expressly held that such matters as are not thus set up or assigned cannot be considered by it on appeal. *Zieg v. State*, 74 Tex. Crim. 306, 171 S.W. 747 (1914); *Harvel v. State*, 126 Tex. Crim. 580, 72 S.W. 2d 604 (1934); and this course has been followed even in a death penalty where on appeal complaint was first made of matters not objected to or excepted to during the trial. *Fisher v. State*, 108 Tex. Crim. 623, 2 S.W. 2d 249 (1927).

As early as 1877, this Honorable Court advanced and adhered to a policy that it did not have jurisdiction if any alleged violated right was not pointed out in the trial court. Mr. Chief Justice Waite, speaking for the Court in ex parte: *Spies*, 31 Lawyer's Edition 80, stated that the Supreme Court had no jurisdiction to review such matter as the State Court itself could not review. In the Spies case, the error complained of on appeal was that a letter said to have been obtained by an illegal search should not have been admitted into evidence. Part of the opinion pertinent here is to the following effect:

> "To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any

treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of the waiver of right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and therefore, no foundation is laid under this objection for the exercise of our jurisdiction."

The Court's present policy is the same and can be seen in the recent case of *Edelman v. California*, 344 U.S. 357 (1953), wherein the Petitioner contends that his conviction for vagrancy violated the Due Process Clause of the 14th Amendment, such contention being made for the first time as one of Petitioner's grounds of appeal. In language reminiscent in the Spies case, Justice Clark, speaking for the Court, said:

"It is clear that this court is without power to decide whether constitutional rights have

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been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. *Hulbert v. Chicago*, 202 U.S. 275, 50 L. Ed., 1026, 26 S. Ct. 617 (1906); *Mutual Life Inc. Co. v. McGrew*, 188 U.S. 291, 308, 47 L. Ed. 480, 484, 23 S. Ct. 375, 63 L.R.A. 33 (1903). Non compliance with such local law can thus be an adequate state ground for a decision below. Aside from state law regarding the scope of review in cases such as this one, we note that California permits affirmance in criminal cases where the appellant fails to appear. It follows that the question whether the vagrancy statute is invalid under the Fourteenth Amendment is not properly before us."

In the view of these pronouncements and the adherence of this Honorable Court to a well defined policy requiring any Federal question to be "specially set up or claimed" the Petitioner has never invoked the jurisdiction of this Supreme Court. His only objection being so broad as to say in effect that his arrest is in violation of the United States Constitution, and he gave the trial and appellate court below nothing to decide and such having occurred, this Court is without a jurisdictional basis to grant a Writ of Certiorari or to review the prior proceedings in any manner. The Court based its decision entirely upon non-federal grounds, and did not consider any question relating to a violation of the Fourteenth Amendment. As stated in *Lynch v. New York*, 293 U.S. 52 (1934):

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from

> the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Furthermore, where it appears that the judgment of the State court *might** have rested on a non-federal ground, this Court will not take jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541 (1952).

It is submitted that the Court of Criminal Appeals of Texas in this case did not find it necessary to base its decision on the merits, if any, of a federal claim or claims, if any, but that adequate state grounds existed for final determination of the cause.

Statement

Petitioner was indicted by Grand Jury, charged with the offense of possessing a bomb under Article 1723, Texas Penal Code (Vernon 1948), convicted and sentenced to 5 years in the penitentiary.

> "The witness Smith testified that as he left the picture show on the night in question he observed two men near an Oldsmobile which was parked adjacent to his automobile close to the Prescription Pharmacy. He stated that as he approached they hastily got in the Oldsmobile and that one of them, whom he later learned to be Glen Roach, was carrying a bag with handles.

*Emphasis added throughout.

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He did not get a good view of the other man and could not identify the appellant as being such man. He inspected his automobile to determine if anything had been stolen therefrom, took the license number of the Oldsmobile, and reported the same to the police.

"Officer Wilson testified that he received the license number from Smith and proceeded in search of the Oldsmobile. He stated that as he passed the Prescription Pharmacy he saw two men standing on the sidewalk; that he proceeded on James Street and saw the Oldsmobile, which bore the license number he had been given, parked with only the driver seated therein; that he made a U-turn and as he returned the Oldsmobile drove off and turned on Caddo Street; that the two men who had been standing on the sidewalk got into the Oldsmobile, and he followed it. He stated that he overtook it on West Henderson Street and signaled it to stop, that when the two automobiles came to a halt and the driver of the Oldsmobile, whom he later learned to be James Buchanan Hill, the owner thereof, got out and came back to the police car, and that he went forward to the Oldsmobile, where he found Glen Roach seated in the middle and the appellant seated on the outside. When these two got out he stated that he saw a canvas bag on the floorboard behind where their feet had been. The bag was shown to contain a quantity of nitroglycerin, detonation caps, wires, a sledge hammer, punches, gloves, and a partially empty bottle of whisky. The appellant had been drinking.

"Officer Wilson further testified that after placing these men under arrest he returned to the Prescription Pharmacy and there found under a window a large crowbar.

"On the issue of probable cause, Officer Wilson testified, in the absence of the jury, that Smith had reported to him that some men were hiding behind an Oldsmobile when he came out of the show and suggested he should investigate to see whether they were stealing." Opinion, Court of Criminal Appeals, page 20 of Petitioner's Brief.

Questions Presented

1. Does this Court have jurisdiction?
(See "Jurisdiction" above)

2. Assuming, *arguendo*, that jurisdiction exists, was the arrest of Petitioner herein illegal?

3. Assuming, *arguendo*, that jurisdiction exists, was the evidence acquired in the above arrest admissible?

4. Assuming, *arguendo*, that jurisdiction exists, has there been a violation of due process under the Federal or State constitutions or laws?

Argument

The argument that this Court does not have jurisdiction is set out above under the "Jurisdiction" heading. Further, it must be noted that Petitioner's Points of Error (1) and (2) on pages 8 and 9 of his brief claim a violation of the Fourth Amendment to the United States Constitution, and Article I, Section 9 of the Texas Constitution. It is submitted that the Fourth Amendment ordinarily is directed only against the Federal government and its agencies and

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not against the individual conduct of State officials. *U.S. v. Smith*, 23 F. Supp. 528 (1938); *State v. Vilott*, 1 S.W. 2d 827 (1927). Cases cited by Petitioner throughout his brief stand generally for the proposition that there must be probable cause for an arrest and that mere suspicion is not enough. This of course is true and point up the fact that there is probable cause in this case.

Counter Point I in Answer to Petitioner's Point (1)

Article 1, Section 9 of the Texas Constitution reads as follows:

> "*No Unreasonable Seizures and Searches Allowed*—
>
> "The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

There has been no violation of the Texas Laws or Constitution, nor the Federal Constitution or Laws. Probable cause for the arrest is shown. (S.F. pp. 6, 7, 26, 27) Upon information from a credible person, the police officer made the arrest and search.

The facts and circumstances within the knowledge of the arresting officer and of which he had reasonably trustworthy information were sufficient to warrant a man of reasonable caution that probable

cause existed. *Carroll v. U. S.*, 267 U.S. 132 (1925), *State v. Vilott, supra; Pruett v. State;* 114 Tex. Crim. 44, 24 S.W. 2d 41 (1930); *Minor v. State*, 153 Tex. Crim. 242, 219 S.W. 2d 467 (1949); *Rutherford v. State*, 135 Tex. Crim. 530, 121 S.W. 2d 342 (1938); *Bevins v. State*, 110 Tex. Crim. 52, 7 S.W. 2d. 532 (1928); *Jones v. State*, 122 Tex. Crim. 344, 55 S.W. 2d 560 (1932).

Article 214, Texas Code of Criminal Procedure (Vernon 1948), reads as follows:

> "The municipal authorities of towns and cities *may* establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or about to commit some offense against the laws." (Emphasis added.)

Petitioner contends that such rules had not been established by the City of Cleburne. Assuming this to be true, it is submitted that the above article is permissive and not mandatory, and that the duties and powers of a peace officer are set out in Article 37, V.C.C.P., as follows:

> "It is the duty of *every peace officer* to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall, in every case where he is authorized by the provisions of this Code, *interfere without warrant to prevent or suppress crime.* He shall execute all lawful process issued to him by any

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> magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. *He shall arrest offenders without warrant in every case where he is authorized by law,* in order that they may be taken before the proper magistrate or court and be tried. (Emphasis added.)

Then, under Article 215, V.C.C.P., which states:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, *without warrant,* pursue and arrest the accused."

It is then the officers' duty to pursue and capture the offender and to seek all possible information. *Agnello v. U. S.* 269 U.S. 20 (1925); *Hill v. State,* 37 Tex. Crim. 415, 35 S.W. 660 (1896); *Cortez v. State,* 47 Tex. Crim. 10, 83 S.W. 812 (1904).

It is clear then that under the general laws of the State of Texas (Art. 37, V.C.C.P.) that the peace officers were acting within the scope of their authority by law already occupied by legislative enactments. The city charter was not inconsistent with the general laws of Texas relating to the same matters or subject. *Leach v. Coleman,* 188 S.W. 2d 220 (Tex. Civ. App. 1945, error ref.) Furthermore, a policeman of a city is a public officer holding his office as a trust from the State, and not as a matter of contract between himself and the city. *Ex parte Preston,* 72 Tex. Crim. 77, 161 S.W. 115 (1913).

Counter Point II in Answer to Petitioner's Point (2)

It is worthy of note that Petitioner cites no authorities in support of his Argument for Points II and III.

The following quotations from *Carroll v. U. S. supra*, are pertinent.

> ". . . The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable. . . .
>
> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.
>
> ". . . So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category [of the Fourth Amendment]. Commonwealth v. Dana, 2 Met. (Mass.) 329. Many other things of this character might be enumerated.

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". . . The guarantee of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

". . . The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected.

". . . If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient [to show probable cause.]"

Petitioner herein did not own the automobile which was searched and cannot complain of the evidence so obtained. *Smith v. State*, Tex. Crim., 262 S.W. 2d 723 (1953); *Moss v. State*, 135 Tex. Crim. 181, 117 S.W. 2d 428 (1938); *Lee v. State*, 148 Tex. Crim. 220, 185 S.W. 2d 978 (1945); *Brubaker v. U.S.*, 183 F. 2d 894 (1950); *U.S. v. Pisano*, 193 F. 2d 361 (1951).

Petitioner cites Article 729a, V.C.C.P., on page 15 of his brief. He apparently meant to cite Article

727a, V.C.C.P., since there is no Article 729a in the Code. If Petitioner meant to cite 727a, his quotation thereof on page 15 of his brief is incorrect since he quotes the article as amended by Acts 1929, 41st Leg., 2nd C.S., p. 79, ch. 45, § 1, and Article 727a correctly quoted reads as follows:

> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

It appears that Texas has adopted all laws of the United States and all portions of the United States Constitution which pertain to the use of evidence obtained in violation thereof.

Assuming this to be true, your Respondent submits that Petitioner must still show jurisdiction, a violation of the laws of the United States, or a violation of a constitutional provision, *which he has not done*, and, further, Petitioner does not allege what United States statute, if any, is violated.

Furthermore, as stated by this Court in *Schwartz v. Texas*, 344 U.S. 199 (1952) at page 203, in construing Article 727a (before the 1953 amendment):

> "It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence."

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Counter Point III in Answer to Petitioner's Point (3)

In approaching the question of due process, it must be remembered that in our particular dual form of government, nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as that power has been withdrawn by the Federal Constitution. *Hurtado v. California*, 110 U.S. 535 (1884). This Court may not pass upon the expediency, wisdom, or justice of the laws of the State, but may only determine their conformtiy with the Federal Constitution. In determining due process this Court may take into account only those fundamental rights which are expressed in that provision. *Twining v. New Jersey*, 211 U.S. 78 (1908). Due process requires that the Court have jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714 (1877), and that there shall be notice and opportunity for hearing given the parties. *Roller v. Holley*, 176 U.S. 398 (1899). Subject to these two fundamental rules, this Court has sustained all State laws regulating procedure, evidence and methods of trial as being constistent with due process of law. *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Caldwell v. Texas*, 137 U.S. 692 (1891); *Leeper v. Texas*, 139 U.S. 462 (1891); *In re Duncan*, 139 U.S. 449 (1891), and *Twining v. New Jersey*, *supra*.

From these decisions it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal

rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted complies with reasonable notice and affords fair opportunity to be heard. As stated in *Louisville and Nashville Railroad Co. v. Schmidt*, 177 U.S. 230 (1900):

> "... It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend; . . ."

See, also, *Hooker v. Los Angeles*, 188 U.S. 314 (1903), and *Rogers v. Peck*, 199 U.S. 425 (1905).

Furthermore, in a prosecution in a State Court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. *Wolf v. Colorado*, 338 U.S. 25 (1949).

It is not clear from Petitioner's notice of appeal and brief filed herein just what action he seeks from this Court. In his Conclusion, Petitioner assumes that certiorari or jurisdiction in a direct appeal has been established, since he asks that the judgment of the Court of Criminal Appeals be reversed and not that a Writ of Certiorari be granted by this Court.

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Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari and/or Jurisdiction should be denied.

Respectfully submitted,

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Attorneys for Respondent

April ....., 1955

A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the Supreme Court of the United States, have been mailed this date to Hon. Angelo Piranio, 630 Gibralter Life Building, Dallas, Texas, Attorney for Petitioner, by first class mail, postage prepaid.